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No. 14-419

In the Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments.

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Bar Association ("ABA") submits this brief in support of petitioner Sila Luis. Although the ABA takes no position on the merits of Ms. Luis' underlying criminal case, the ABA respectfully submits that the Fifth and Sixth Amendments preclude an expansion of the government's use of pretrial restraint orders to freeze a defendant's lawfully obtained, untainted assets that are needed to retain and pay counsel of choice.

The ABA is one of the largest voluntary professional membership organizations and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all fifty states, the District of Columbia, the U.S. Territories, and other jurisdictions, and include prosecutors, public defenders, private defense counsel, and appellate lawyers. They also include attorneys in law firms, corporations, non-profit organizations, and governmental agencies, as well as judges, legislators, law professors, law students and non-lawyer associates in related fields.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person, other than the *amicus curiae*, its members, and its counsel made any monetary contribution to is preparation and submission. The parties have consented to this filing.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor

Since its founding in 1878, the ABA has worked to protect the rights guaranteed by the Constitution, including the rights of criminal defendants to Due Process and to retain counsel of choice. Of particular relevance to the issues in this case are the ABA's standards and rules of professional conduct that promote the competence, ethical conduct and professionalism of lawyers. These considerations provide the foundation for the ABA MODEL RULES OF PROFESSIONAL CONDUCT ("ABA Model Rules"),[3] which are intended to apply at all times, including when lawyers are representing defendants whose assets have been frozen. Although authority for regulation of lawyers is vested primarily in the courts of the licensing jurisdictions, the ABA Model Rules are

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was it circulated to any member of the Judicial Division Council before filing.

[3] The ABA Model Rules are available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html. First adopted as ABA policy in 1908 as the CANONS OF PROFESSIONAL ETHICS, they have been continuously amended and updated through the efforts of ABA members, national, state and local bar organizations, academicians, practicing lawyers, and the judiciary. A Model Rule becomes ABA policy only after it is approved by the ABA House of Delegates, which is composed of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, ABA members, and the Attorney General of the United States, among others. See ABA General Information, *available at* http://www.americanbar.org/groups/leadership/delegates.html.

intended as a national framework for assuring professional competence and ethical conduct.[4]

These same considerations are reflected in the ABA STANDARDS FOR CRIMINAL JUSTICE ("Criminal Justice Standards").[5] While they do not purport to establish the constitutional baseline for effective assistance of counsel, *see Rompilla v. Beard*, 545 U.S. 374, 399 (2005) (Kennedy, J., dissenting), this Court has recognized them as "valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1482 (2010). *See also Strickland v. Washington*, 466 U.S. 668, 688 (1984)) ("Prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what [performance of counsel] is reasonable").

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[4] Except for California, each State and the District of Columbia has adopted a version of the ABA Model Rules and its numbering system. In addition, the highest courts of the United States Virgin Islands and American Samoa have stated that the conduct of lawyers in their territories is governed by the ABA Model Rules.

[5] The Criminal Justice Standards are *available at* http://www.americanbar.org/groups/criminal_justice/policy/standards.html; *see also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15 (Winter 2009). They have been developed and revised by the ABA Criminal Justice Section, working through broadly representative task forces made up of prosecutors, defense lawyers, judges, academics, and members of the public and other groups with a special interest in the subject. Like the ABA Model Rules, they must be approved by vote of the ABA House of Delegates before they become ABA policy.

The ABA Model Rules and Criminal Justice Standards have provided the basis for the ABA's decades-long examination of the relationship between the legal profession's obligations and the Fifth and Sixth Amendment rights of an accused to retain counsel of choice. The results of that examination led the ABA to file amicus briefs in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491 U.S. 617 (1989),[6] and in *Kaley v. United States*, 134 S. Ct. 1090 (2014).[7] Based on that examination, the ABA now submits that the Fifth and Sixth Amendment rights of the accused, which are fundamental to our criminal justice system, preclude expansion of the government's ability to use pretrial restraints to encompass a defendant's lawfully obtained, untainted assets.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decisions in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), *United States v. Monsanto*, 491 U.S. 600 (1989), and *Kaley v. United States*, 134 S. Ct. 1090 (2014), explicitly distinguished between assets that were the proceeds of, or facilitated, criminal violations ("tainted" assets) and those that were not ("untainted" assets) in explaining why pretrial restraints on "tainted" assets could withstand Fifth and Sixth Amendment objections. This case

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[6] The ABA filed one amicus brief for both cases. That amicus brief is available at 1989 WL 1127836.

[7] Available at 2013 WL 3458156 (U.S.).

represents a profound expansion of the government's pretrial exercise of control over a defendant's assets. Unlike previous asset forfeiture cases this Court has considered, the pretrial restraining order in this case covers not only tainted assets, but also bars the use of lawfully obtained, untainted property to secure representation by counsel of choice.

That distinction is pivotal. First, the Eleventh Circuit was incorrect to conclude summarily that petitioner's challenge to pretrial restraints on lawfully obtained, untainted property was "foreclosed" by *Caplin & Drysdale*, *Monsanto*, and *Kaley*. *See* Pet. App. 3. Second, in disregarding that distinction, the Eleventh Circuit ignored the principal legal basis upon which, as *Kaley* observed, a defendant can contest a pretrial asset freeze order—the traceability of assets to the alleged offense. *Kaley*, 134 S. Ct. at 1099 n.9. If, along with any "tainted" assets, defendants are also prevented pretrial from using their lawfully obtained assets to retain counsel of choice, then there is no practical purpose to challenging "traceability," and *all* of the accused's assets are potentially unavailable to retain counsel.

Third, the ramifications for the criminal justice system of permitting pretrial restraint of untainted assets are pervasive and uniquely harmful. If the government can restrain pretrial a defendant's use of untainted assets to retain counsel of choice, then the government is effectively granted the capability to deprive the accused of counsel of choice. Because lawyers will not know whether or when the

government may make a defendant's untainted assets unavailable, they would accept the representation risking violation of their professional ethical codes by entering into what may become, at any time, a contingent-fee arrangement that is dependent on the outcome of the trial. The risk of losing counsel of choice under such circumstances is widely recognized to discourage candor and interfere with formation of an attorney-client relationship. Even if lawyers agree to continue the representations pro bono, or the accused must accept court-appointed counsel, such defendants are disadvantaged because their lawyers will have limited resources available for conducting research and investigations, and for developing strategies for defense, for negotiations with the prosecution, and for conducting trial. Moreover, if the defendant is found not guilty, or the government is otherwise found not entitled to untainted assets that were needed for payment of counsel of choice, the defendant's deprivation of counsel of choice is a structural error that cannot be cured. *United States v. Gonzalez-Lopez*, 547 U.S. 140, 148 (2006) ("Deprivation of the right [to be assisted by counsel of choice] is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants").

The Eleventh Circuit's conclusion is all the more incorrect because the relevant statutory language contains no indication that Congress intended to abridge Fifth and Sixth Amendment rights. In these circumstances, there is no basis for attributing to Congress such a constitutionally infirm intent.

ARGUMENT

DUE PROCESS AND THE SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE PRECLUDE PRETRIAL RESTRAINTS ON A CRIMINAL DEFENDANT'S USE OF LAWFULLY OBTAINED ASSETS TO RETAIN COUNSEL

A. Pretrial Restraint of Untainted Assets Needed to Retain Counsel Effectively Precludes Defendants From Exercising Their Constitutional Right to Counsel of Choice

When an indictment charges an offense for which a defendant's assets may be subject to forfeiture upon conviction as alleged proceeds or instrumentalities of the offense, it is now routine for the government to seek a pretrial order restraining those assets. Although a defendant is presumed innocent, a pretrial order that restrains assets needed to pay counsel effectively precludes the defendant from exercising core Sixth Amendment rights at a critical time. "[T]he choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial." *Gonzalez-Lopez*, 548 U.S. at 150. It will affect "strateg[y] with regard to investigation and discovery, development of the theory of defense, [and] selection of the jury." *Id.* Both before and after the return of an indictment, a defendant has no more essential or important resource than the guidance and independent judgment of counsel who is intimately familiar with

the case. Indeed, selection of counsel may be the most important contribution a defendant makes to her defense. *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979) (citing *Faretta v. California*, 422 U.S. 806 (1975); *Brooks v. Tennessee*, 406 U.S. 605 (1972)).

Pretrial freezing of untainted assets needed to retain counsel is a concern not only for the defendant, but for counsel, the courts, and the criminal justice system. When a defendant's wholly legitimate assets are frozen prior to trial, counsel may have to continue the representation pro bono or withdraw, leaving the client unrepresented at a particularly vulnerable time or forced to start over with newly appointed counsel with no knowledge of the case and with whom the client has no established relationship of confidence and confidentiality. Otherwise, the attorney-client relationship would be transformed into a contingency fee arrangement that depends on the outcome at trial, in violation of bedrock attorney ethics rules in every State.[8] As ABA Model Rule 1.5(d)(2) states, "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." *See also* ABA, Model Rule 1.7(b) (representation barred by conflict where lawyer

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[8] The state rules of professional conduct are available at: http://www.americanbar.org/groups/professional-responsibility/resources/links_of_interest.html. A comparison of individual ABA Model Rules to each of the state rules can be found at: http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html. *See also* Geoffrey C. Hazard, Jr., & Susan P. Koniak, *The Law and Ethics of Lawyering* 508 (1990) ("All states prohibit contingent fees for the defense of a criminal case").

representation limited by material personal interest); ABA Criminal Justice Standard 4-3.4(k) ("Defense counsel should not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case or in a criminal forfeiture action"). Consistent with these principles, courts have held that contingent fee arrangements create an actual conflict of interest that compromises the independence of counsel. *E.g., Winkler v. Keane*, 7 F.3d 304, 307-08 (2d Cir. 1993) (noting that contingent fee created a disincentive for counsel to seek a plea agreement or to pursue mitigating defenses that would have resulted in conviction for a lesser offense); *Ibn-Tama v. United States*, 407 A.2d 626 (D.C. 1979) (vacating murder conviction where contingent fee arrangement and actions of counsel had "completely ruptured and torn asunder" the attorney-client relationship).

The Justices of this Court unanimously recognized, in the majority and dissenting opinions in *Kaley*, that the right to choose counsel prior to a criminal trial is of "vital interest" to the defendant, and is, in fact, the "root meaning" of the Sixth Amendment that "matters profoundly." *Compare Kaley*, 134 S. Ct. at 1102 (citing *United States v. Gonzalez-Lopez*, 547 U.S. 140, 146 (2006)), *with id.* at 1114-15 (Roberts, C.J., dissenting) ("Granting the Government the right to take away a defendant's chosen advocate strikes at the heart of [the] significant role" of the "independent bar as a check on prosecutorial abuse and government overreaching").

Pretrial deprivation of the right to counsel of choice by freezing defendant's lawfully obtained property that is needed for payment of counsel has such deleterious practical consequences that it has been described as a "'nuclear weapon' of the law." *United States v. Ramilovic*, 419 F.3d 134, 137 (2d Cir. 2005) (quoting *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999)). Most significantly, a defendant subject to pretrial restraint of assets may find that counsel of choice is simply unobtainable when, as under the decision below, *none* of a defendant's assets are beyond the control and discretion of the prosecution. And when the government alleges joint and several liability against conspirators, the amount sought through forfeiture may exceed the defendant's total assets, making *all* her assets subject to pretrial restraint. *See, e.g., United States v. Cano-Flores*, 2015 WL 4666891 (D.C. Cir. Aug. 7, 2015) at *16 ("Forfeiture amounts calculated under the government's view may consist almost entirely of the amounts that the defendant never obtained").

Even if counsel could be found who would accept an engagement in these circumstances, the potential that the attorney-client relationship will become a contingent fee arrangement can impede the development of the trust needed for effective assistance of defense counsel.[9] Where a pretrial

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[9] In plea bargain negotiations, for example, the attorney's potential conflict of interest becomes more concrete when a defendant is offered the opportunity to plead guilty to a lesser offense that would financially disadvantage his lawyer by forfeiting funds that would otherwise be available to pay counsel.

freeze of lawfully obtained assets puts counsel's continued participation at risk, defendants and courts face the prospect of having to replace counsel at a time of the prosecutor's choosing, even as late as the eve of trial. In those circumstances, defendants and the criminal justice system as a whole bear the burden of replacement counsel who have had less or even insufficient time to prepare the defense. The prospect of governmental veto casts a cloud over the effective representation provided by counsel.

As this Court held in *Gonzalez-Lopez*, a violation of the Sixth Amendment right to *counsel of choice* is not cured by the substitution of *effective* counsel to conduct the trial. "Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." 548 U.S. at 148; *id.* at 146 (Sixth Amendment guarantees right to be "defended by the counsel he believes to be best," for which "[n]o additional showing of prejudice is required to make the violation 'complete'"). Denial of this right is

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E.g., *Winkler v. Keane*, 7 F.3d at 307-08; *see also* Pamela Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 715-17 (1991) (discussing additional ways contingent fee arrangements undermine the attorney-client relationship). Conflicts of interest are not limited to the ramifications of impending contingency. *See, e.g.*, *United States v. Cosme*, 2015 WL 4716437 (2d Cir. Aug. 10, 2015) at *2 ("attorney asked to be relieved because of the conflict between his position as a court-appointed lawyer and [defendant's] potential *Monsanto* hearing, the purpose of which would be to obtain the release of seized funds in order to hire a replacement lawyer").

among "'a very limited class of errors' that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole." *United States v. Davila*, 133 S. Ct. 2139, 2149 (2013) (quoting *United States v. Marcus*, 560 U.S. 258 (2010)). It is deemed "structural" error because "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." *Gonzales-Lopez*, 548 U.S. at 150.

If defendants in criminal proceedings are unable to use their legally obtained, untainted property to retain private counsel, then accepted notions of effective assistance of counsel, the right to counsel of choice, and a balanced adversary system will have undergone a transformative shift. The right to counsel will be eroded because it will depend on what the government is willing to permit for a particular defendant. In addition, forcing an otherwise non-indigent defendant to accept appointed counsel places an additional strain on the already limited resources available for representing the truly indigent, to the further detriment of the criminal justice system.[10]

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[10] A likely consequence of freezing assets that otherwise would be available to pay retained counsel is that courts will have to appoint attorneys at government expense. But a defendant who is restrained from using lawfully-obtained assets to pay an attorney, even as he retains title to the frozen assets (until such time when, post-conviction, they may be forfeited), may be deemed non-indigent, and thus ineligible for appointed counsel. Thus, the power to restrain untainted assets pretrial potentially confers on prosecutors the authority to create a constitutionally unacceptable, counsel-deprived limbo. The risk is not

B. Pretrial Restraint on Legally Obtained Assets Needed to Retain Counsel of Choice is Contrary to this Court's Sixth Amendment Precedents

This Court's repeated reliance on the nexus between the assets and the offense charged to justify pretrial restraints is central to the constitutional analysis. Since 1989, this Court has addressed—in *Caplin & Drysdale, Monsanto* and *Kaley*—potential conflicts between the government's use of its statutory criminal forfeiture authority and the constitutional role of the right of counsel in the administration of our criminal justice system. In those three cases, the Court upheld the unambiguous statutory authority to restrain pretrial—and ultimately forfeit post-conviction—only *tainted* property in the face of claims that such property should be available to retain counsel. *See, e.g., Kaley*, 134 S. Ct. at 1096 (describing and quoting *Caplin & Drysdale* as holding "the Government does not violate the Constitution if, pursuant to the forfeiture statute, 'it seizes the robbery proceeds and refuses to permit the defendant to use them' to pay for his lawyer").

Caplin & Drysdale arose after conviction, and

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hypothetical. Only persons "financially unable" to pay for retained counsel are entitled to appointed counsel, 18 U.S.C. § 3006A, and their proof of indigence is made on pain of perjury. *United States v. Kahan*, 415 U.S. 239, 243 (1974). A trial court may exclude restrained or forfeitable assets from this determination, or it may not. *United States v. Salemme*, 985 F. Supp. 197, 203 (D. Mass. 1997) (excluding some forfeitable property from financial disclosure requirements but not others).

there was no dispute that the drug proceeds—which had already been found to be drug proceeds pursuant to a guilty plea—were both tainted and actually forfeited. *See In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 641-42 (4th Cir. 1988)) (en banc), *aff'd*, 491 U.S. 617 (1989). In upholding the post-conviction forfeiture, this Court's majority opinion cited and relied on the relation-back doctrine, a common law principle codified in federal forfeiture statutes and identified by this Court as the "'taint theory' ... long recognized in forfeiture cases." 491 U.S. at 627 (citing *United States v. Stowell*, 133 U.S. 1 (1890) and quoting legislative history). Under the relation-back doctrine, title to tainted property (*i.e.*, drug proceeds) automatically becomes vested in the government at the time it is used unlawfully. *Id.*[11] Thus, as the Court explained, the tainted property at issue belonged to the government and the defendant never had lawful ownership of it.

In reaching that conclusion, *Caplin & Drysdale* delineated the constitutional boundaries of the Sixth Amendment's protection of the right to retain counsel of choice: it "does not go beyond the *individual's right to spend his own money* to obtain the advice and assistance of counsel." 491 U.S. at 626 (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 370 (1985) (ellipsis in original, emphasis added). This pivotal distinction between tainted and untainted assets was reaffirmed in *Kaley*: "stolen money" and "ill-gotten gains" cannot be used to defend the robbery suspect because "[t]hat money is not

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[11] 21 U.S.C. § 853(c) (vesting interest in tainted property "upon commission of the act giving rise to forfeiture").

rightfully his," and he "has no Sixth Amendment right to spend another person's money for legal fees." *Kaley*, 134 S. Ct. at 1096-97 (quoting *Caplin & Drysdale*)); *id.* at 1097 ("no one contests that the assets in question derive from, or were used in committing, the offenses").[12]

In *Caplin & Drysdale, Monsanto* and *Kaley*, the relevant interest the Court identified in the pretrial restraint context was not any government interest in untainted assets, but rather was limited to securing "'ill-gotten gains'" or "'stolen assets.'" Similarly, both the majority and dissenting opinions in *Kaley* recognized an appropriate role for a pretrial hearing to identify traceable assets. 134 S. Ct. at 1095 n.3 (Government agreed that defendant has a constitutional right to a hearing on traceability); *id.* at 1111 (Roberts, C.J., dissenting) ("the Government concedes that due process guarantees defendants a hearing to contest the traceability of the restrained assets to the charged conduct").

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[12] *See Kaley*, 134 S.Ct. at 1096 (noting that the district court had excluded from the asset freeze order in that case "$63,000 that it found (based on the parties' written submissions) was not connected to the alleged offenses").

C. The Speculative, Attenuated Interest in Untainted Assets as to Which the Government Might Have a Claim Only After Conviction and Meeting Other Statutory Requirements Does Not Overcome a Defendant's Immediate, Vested Sixth Amendment Right to Use Untainted Property to Engage Counsel of Choice

Legally acquired property should be available to permit the accused to control her defense through selection of counsel. As this Court held in *Gonzalez-Lopez*, and reaffirmed in *Kaley*, a defendant's right to choose counsel is irretrievably lost if denied prior to trial. *Kaley*, 134 S. Ct. at 1102 (citing *Gonzalez-Lopez*); *accord, id.* at 1113-14 ("the right to counsel of choice is inherently transient, and the deprivation of that right effectively permanent") (Roberts, C.J., dissenting).

While the Sixth Amendment interests of a defendant are at their zenith pretrial, the government's contingent interests in a defendant's legitimate assets are at their nadir. No countervailing benefit to the government warrants an immediate and final abridgement of Sixth Amendment protections prior to trial by barring the use of lawfully acquired assets for retaining counsel. Viewed from this perspective, the government's pretrial interest is properly limited to "allegedly tainted assets." *Kaley*, 134 S. Ct. at 1112 (Roberts, C.J., dissenting, citing *Caplin & Drysdale*).

The government's remote general interest in satisfying a future criminal judgment from the defendant's untainted assets depends on three levels of contingency. First, it is contingent on whether the government prevails on the issue of criminality at a future trial. Second, it is contingent on the government prevailing at trial as to the tainted nature of the assets subject to forfeiture. Third, it is contingent on whether the government prevails in showing that the defendant possesses inadequate *tainted* assets to satisfy a forfeiture judgment and that "as a result of any act or omission of the defendant" the tainted assets (as listed in 21 U.S.C. § 853(a)) have been rendered unavailable for forfeiture. Only then has the government established authority to obtain the forfeiture of untainted substitute assets after conviction. 21 U.S.C. § 853(c); 18 U.S.C. § 982(b)(1). *See United States v. Jarvis*, 499 F.3d 1196, 1204-05 (10th Cir. 2007) (noting the government's "potential and speculative" interest prior to trial because "the United States does not have a ripened interest in substitute assets until (1) after the defendant's conviction, and (2) the court determines the defendant's § 853(a) forfeitable property is out of the government's reach for a reason enumerated in § 853(p)(1)(A)-(E)"). Those essential predicates for forfeiture do not exist prior to or during trial.

D. Congress Has Not Authorized Pretrial Restraints that Prevent a Defendant's Use of Her Own Lawfully Obtained Assets to Retain Counsel of Choice

The primacy of a defendant's right to use her own lawfully obtained assets to secure counsel should be all the more impervious to government intrusion because Congress has not endorsed the pretrial restraint of untainted assets. To be sure, Congress has provided a variety of statutory means to advance the government's interest in securing a post-conviction forfeiture judgment, including the relation-back doctrine, and pretrial restraints on *tainted* assets. But Congress has not provided statutory authority for the government to commandeer before trial a defendant's lawful assets needed to mount a criminal defense.

For example, Congress provided express statutory authority for pretrial orders restraining the use of tainted assets, which 21 U.S.C. § 853(a) defines to include property with a nexus to a crime. 21 U.S.C. § 853(e) (authorizing restraints to preserve the "property described in subsection (a) for forfeiture"). *See also* 18 U.S.C. § 982(b)(1) (adopting § 853 forfeiture provisions for other offenses).

Consistent with that statutory limitation, the circuit courts overwhelmingly have held that Congress did not authorize pretrial restraints on lawful "substitute assets." Those courts explained

that substitute assets are not included in § 853(e), which authorizes pretrial restraining orders *only* for the categories of tainted property expressly cross-referenced in § 853(a) (namely, proceeds and instrumentalities), while substitute assets are addressed only in the post-conviction *forfeiture* provision, 21 U.S.C. § 853(p). *See, e.g., United States v. Jarvis*, 499 F.3d at 1204 ("all but one federal court of appeals to address this issue has determined the legislative silence regarding substitute property in § 853(e) precludes pre-conviction restraint of substitute property"); *see also United States v. Parrett*, 530 F.3d 422, 430-31 (6th Cir. 2008) (statutory language does not permit substitute assets to be subject to pretrial restraint); *United States v. Pantelidis*, 335 F.3d 226, 234 (3d Cir. 2003); *United States v. Gotti*, 155 F.3d 144, 149 (2d Cir. 1998); *United States v. Field*, 62 F.3d 246, 249 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359, 363 (9th Cir. 1994); *In re Assets of Martin*, 1 F.3d 1351, 1359 (3d Cir. 1993); *United States v. Floyd*, 992 F.2d 498, 500-02 (5th Cir. 1993);[13] Stefan Cassella, *Asset Forfeiture Law in the United States* §17.1 at 537 (2d ed. 2013) ("canons of statutory

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[13] While all these circuits reached this conclusion based on the plain language of § 853 and its counterpart, 18 U.S.C. § 982, some have noted that the legislative history of the substitute assets provisions confirms congressional intent not to include pretrial restraining order authority over substitute assets. *Ripinsky*, 20 F.3d at 364 n.7; *In re Assets of Martin*, 1 F.3d at 1360 (citing legislative history of predecessor Comprehensive Forfeiture bill, and holding that "Congress clearly intended to exclude substitute assets from property subject to preliminary restraints").

construction dictate the result reached by the majority of courts").[14]

In *Kaley*, this Court construed § 853's statutory restraining order authority in the same manner—concluding that Congress authorized pretrial restraints when "*the property at issue has the requisite connection to that crime. See* § 853(a)." *Kaley*, 134 S. Ct. at 1095 (emphasis added). Section 853(a) is, by definition, limited to tainted property that "has the requisite connection to that crime." *Id.*

The legislative history of the 1984 Comprehensive Forfeiture Act,[15] from which the restraining order provisions of § 853 originate, makes clear that Congress did not intend to abridge Sixth Amendment rights. *See* H.R. Rep. No. 98-845, pt. 1, p. 19 n.1 (1984) ("[n]othing" in 21 U.S.C. § 853 "is intended to interfere with a person's Sixth

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[14] The only arguably contrary authority, *In re Billman*, 915 F.2d 916 (4th Cir. 1990), did not involve funds used for criminal defense nor did it implicate any Sixth Amendment choice of counsel issue. The Fourth Circuit acknowledged that it did not have the benefit of any other circuit opinion on point, *id.*, and it did not conduct a plain language analysis of the statute that all other circuits would later employ to reach the opposite conclusion. When the Fourth Circuit eventually confronted this issue in a subsequent case, it held that the Sixth Amendment required a court to authorize use of untainted property for purposes of retaining counsel. *United States v. Farmer*, 274 F.3d 800, 802, 805 (4th Cir. 2001) (Wilkinson, J.) (holding that defendant has a Sixth Amendment right to use "untainted assets" for criminal defense and citing this Court's majority opinion in *Caplin & Drysdale*).

[15] Pub. L. No. 98-473, § 301, reprinted in 1984 U.S. Code & Ad. News (98 Stat.) 1837, 2040.

Amendment right to counsel"). This Court has construed the legislative history of the 1984 Comprehensive Forfeiture Act as a congressional acknowledgement of the Sixth Amendment issues potentially created by restraining orders, and an "exhortation for the courts to tread carefully in this delicate area." *Monsanto*, 491 U.S. at 609 n.8; *see also Caplin & Drysdale*, 491 U.S. at 636 (Blackmun, J., dissenting) (quoting this legislative history).

In conformity with its express language and stated policy, the statute should not be read to authorize government action that would raise grave constitutional questions. Accordingly, and consistent with this Court's construction of the statute and its legislative history, the circuit courts have held overwhelmingly that when Congress approved substitute assets forfeiture in 1986, it excluded pretrial restraints on substitute assets.[16] In so doing, Congress eliminated the prospect of a conflict between a defendant's Sixth Amendment right to choose counsel and the issuance of a pretrial restraining order to block the use of untainted assets for that purpose.

In this case, the government has not invoked the general pretrial restraint provisions authorized by Congress for criminal forfeiture cases, § 853(e). Rather, the government invoked a specialized statute

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[16] Statutory authority for substitute assets forfeiture was enacted as part of the Drug Possession Penalty Act of 1986, a title within the Anti-Drug Abuse Act of 1986. Pub. L. No. 99-570, title 1, §1153(a) & (b), 100 Stat. 3207-13 (1986).

dealing with injunctions against fraud, 18 U.S.C. § 1345, that is also aimed only at tainted assets—"property, obtained as a result of" a banking or health care violation. *Id.* § 1345(a)(2). More specifically, § 1345(a)(1)(C) authorizes the issuance of injunctions "to enjoin such violation" of banking or health care laws, and, if a person is "violating or about to violate" such a law, § 1345(a)(2) authorizes equitable relief when that person "is alienating or disposing of property, obtained as a result of" such a violation, or which "is traceable to such violation." *Id.* This language is clearly aimed at the use of equitable restraints to "prevent a continuing and substantial injury to the United States" by barring ongoing or prospective violations of banking or health care laws. 18 U.S.C. § 1345(b).[17] *See, e.g, United States v. Phillip Morris USA, Inc.*, 396 F.3d 1190, 1198-99 (D.C. Cir. 2005) (plain meaning of statute authorizing injunctions to "prevent and restrain" RICO violations is limited to prospective relief, and does not include prior violations) (citing *Meghris v. KFC Western, Inc.*, 516 U.S. 479, 488 (1996)).

In turn, § 1345(a)(2) is aimed at prospective transfers or alienations of "traceable" (*i.e.*, tainted) property. Temporary restraints are authorized in

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[17] Indeed, this Court has consistently held that imminent future injury is the sine qua non of equitable relief and the Article III jurisdiction to issue it. *Clapper v. Amnesty, Int'l USA*, 133 S. Ct. 1138, 1147 (2013); *City of Los Angeles v. Lyon*, 461 U.S. 95, 112 (1983). This Court has further held that federal courts lack inherent equitable authority to restrain assets prior to judgment. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 326 & n.8 (1999).

§1345(a)(2)(B) only with respect to imminent transfers of tainted assets. Lawfully obtained property spent on legal representation simply is not property traceable to an ongoing health care violation, nor to a transfer of traceable proceeds.

This plain-language, common-sense reading of §1345 is fully consistent with congressional failure to approve pretrial restraints on substitute assets, *Parrett*, 530 F.3d at 429-30, and with this Court's admonition not to construe statutes in a manner that would actually or potentially conflict with constitutional rights. *See, e.g., Skilling v. United States*, 561 U.S. 358, 406 (2010); *Cleveland v. United States*, 531 U.S. 12, 24-25 (2000); *United States v. Bass*, 404 U.S. 336, 349-350 (1971). This Court requires a clear statement from Congress that it intends such a constitutional conflict. *Id.*; *McNally v. United States*, 483 U.S. 350, 359-60 (1987). Congress must, at a minimum, speak clearly before it encumbers the right to counsel by pretrial freezing of the legitimate assets necessary to pay them.

The statutes involved in this case do not meet that standard. This conclusion is particularly compelling in this case because, when Congress spoke directly to the issue of untainted "substitute assets," it did not authorize restraint of such assets pretrial and permitted it only for post-conviction forfeitures. *See Jarvis*, 499 F.3d at 1204 (legislative silence

regarding substitute property in § 853(e) precludes pre-conviction restraint of substitute property).[18]

E. Due Process Protects a Defendant's Right to Use Lawful Assets for Her Criminal Defense

Prior restraints on a defendant's financial ability to defend herself by spending lawfully obtained assets also runs afoul of the Due Process Clause of the Fifth Amendment. The Due Process Clause guarantees that federal criminal proceedings will be fundamentally fair. *Estelle v. Williams*, 425 U.S. 501, 505 (1976). Moreover, due process protects both a defendant's substantive right to a fair trial, *Wardius v. Oregon*, 412 U.S. 470 (1973), and to fair criminal procedures. As Chief Justice Roberts observed in his dissent in *Kaley*, "[t]he possibility that the prosecutor could elect to hamstring his target by preventing him from paying his counsel of choice raises substantial concerns about the fairness of the entire proceeding." *Kaley*, 134 S.Ct. at 1107 (Roberts, C.J., dissenting) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). Barring a defendant from using legitimate untainted assets to defend herself prior to and during trial undermines both components of due process.

The Due Process Clause speaks to "the balance of forces between the accused and his accuser." *Wardius*, 412 U.S. at 475. The right of counsel is a

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[18] *See* n.14, *supra*, discussing *In re Billman*, 915 F.2d 916 (4th Cir. 1990).

necessary component for a fair balance between the defendant and the government because an independent counsel is an essential ingredient of a fair trial. *Polk County v. Dodson*, 454 U.S. 312, 322 (1981). Prior restraints on untainted assets needed to pay attorneys' fees enable the government to determine who will be its adversary, to restrict the resources available to the defense, and even to determine when chosen counsel will be replaced with substitute counsel. The prospect of such restraints on untainted assets compromises the independence of counsel and places counsel's financial interests in conflict with the interests of the client. *See* pages 8-10, *supra*. Fundamental fairness demands that an accused person not be thus encumbered in presenting a defense. A system that grants one party the discretion to restrict and control the lawfully obtained resources available to its opponent is not the adversarial system that has existed throughout our history. The Constitution and the traditions of our criminal justice system demand that the government prevail by proving its allegations, not by impeding an accused's ability to mount a defense.

Under the decision below, a lifetime of lawful labor offers no protection against the loss of the right to counsel of choice precisely when it is of the most value to the accused. For these reasons, the decision of the Eleventh Circuit tilts the scales sharply—and incorrectly—in favor of the prosecution. That is an imbalance our Constitution should not abide.

CONCLUSION

The American Bar Association respectfully requests that the judgment of the Eleventh Circuit be reversed.

Respectfully submitted.

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